

The Landlord's Tacit Hypothec in South African Law

By **Alicia Powell** (Senior Associate),
and **Tyrelle Toorn** (Candidate Attorney)

28 May 2025

INTRODUCTION

A well-established common law principle in South African law is the landlord's tacit hypothec. The hypothec affords the landlord, as the creditor, a real right over the movable assets of the tenant as security for payment of arrear rental. Although the hypothec is a crucial safeguard for landlords, courts have questioned its applicability and enforceability, especially in circumstances involving third-party ownership of assets situated on the leased premises.

THE NATURE AND FUNCTION OF THE TACIT HYPOTHEC

An express agreement between the landlord and tenant is not an essential element for the exercise of the landlord's tacit hypothec, it is an implied legal right afforded to landlords, which right becomes enforceable when the tenant defaults on payment of rental.

In order for the landlord to enforce the hypothec, the landlord is required to make a formal demand to the tenant for payment of the arrear rental. Should the tenant remain in default, the landlord must commence formal legal proceedings to obtain an order of court in order to lawfully attach the tenant's movable assets situated on the leased premises.

The hypothec is completed once the court grants the order to attach the tenant's movable assets and thereby allowing the landlord to execute against the assets that have been judicially attached.

CASE OVERVIEW: EIGHT KAYA SANDS V VALLEY IRRIGATION EQUIPMENT

Several court cases have examined the enforceability of the tacit hypothec, most notably the case of *Eight Kaya Sands v. Valley Irrigation Equipment* 2003 (2) SA 495 (T). This case dealt with the question of whether a landlord could legitimately retain third-party assets in terms of the tacit hypothec after the tenant had placed them on the leased premises.

In the abovementioned case, certain equipment owned by Valley Irrigation Equipment was leased to a tenant. The tenant kept the equipment at the leased

premises. The landlord (Eight Kaya Sands) relied on the tacit hypothec and refused to return the equipment after the tenant became insolvent and was liquidated which resulted in unpaid rental owing to the landlord.

The crucial question to be determined by the court was whether the landlord had perfected the hypothec. The court found that:

- Prior to the liquidation of the tenant, the third party (Respondent) had neglected to notify the landlord of its ownership of the equipment;
- The landlord failed to perfect the hypothec since the landlord did not have a court order attaching the equipment; and
- The Court *a quo* determined that it was too late to obtain an attachment order because the landlord had been made aware of the third-party ownership of the tenant's movable assets.

Van der Walt J. affirmed the Respondent's right to have its property returned.

CONCLUSION

According to South African law, the tacit hypothec only applies to the tenant's movable assets, once the landlord learns of any third-party ownership of the tenant's movable assets, it cannot enforce its hypothec in respect those movable assets belonging to third parties. As demonstrated in *Eight Kaya Sands v. Valley Irrigation Equipment*, if the landlord's hypothec is not perfected by a court order prior to learning of any third-party ownership of the tenant's movable assets, the landlord will be required to release such assets owned by third parties. Therefore, in order to guarantee the legality and enforceability of the landlord's tacit hypothec and avoid any legal objections, landlords wishing to enforce such hypothec must follow the correct legal procedures to secure and enforce their rights.



Alicia Powell
(Senior Associate)



Tyrelle Toorn
(Candidate Attorney)